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IN THE

Supreme Court of the United States

October Term 1956

No. 215

COLGATE-PALMOLIVE COMPANY,

Petitioner,

v.

CARTER PRODUCTS, INC., JOSEPH G. SPITZER and MARVIN SMALL,

Respondents.

BRIEF IN OPPOSITION TO COLGATE'S SECOND PETITION FOR A WRIT OF CERTIORARI

GEORGE B. FINNEGAN, JR.
Attorney for Respondents
30 Broad Street
New York 4, New York

Of Counsel:

WILLIAM D. DENSON
(of Washington, D. C.)

MORRIS KIRSCHSTEIN
JEROME G. LEE

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Explanation of Abbreviations Used in this Brief

Abbreviation	For
1st Pet.	Colgate's first petition for a writ of certiorari, filed June 8, 1956
2nd Pet.	Colgate's instant second petition for a writ of certiorari, filed June 22, 1957
1st Pet. App.	Appendix to Colgate's first petition
2nd Pet. App.	Appendix to Colgate's second petition
P. A.	Plaintiffs' [Respondents'] Appendix to Court of Appeals Brief
P. Ex.	Plaintiffs' Exhibit
Tr.	Trial transcript page (not printed)

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Respondents.

BRIEF IN OPPOSITION TO COLGATE'S SECOND PETITION FOR A WRIT OF CERTIORARI

Statement of the Case

This is a suit for infringement of Spitzer, Reich and Fine patent 2,655,480 for pressurized self-generating lather compositions instituted in the U. S. District Court for the District of Maryland on October 13, 1953.

At the trial, petitioner Colgate contested validity of all 21 claims of the patent, but entered into a stipulation admitting infringement of eight of the claims (P. A. 1).

The District Court on March 10, 1955 and the Court of Appeals for the Fourth Circuit on March 8, 1956 held all 21 claims of the patent valid.

After Colgate's first petition for certiorari was denied by this Court (352 U. S. 843, rehearing denied 352 U. S. 913) and after plaintiffs had instituted accounting proceedings under the March 8, 1956 judgment of the Court of Appeals, Colgate made a motion in the District Court on December 7, 1956 to be relieved of its stipulation conceding infringement of the patent and for a new trial on the issue of infringement.

The motion was based upon the contention that the Court of Appeals in its decision of March 8, 1956 had so narrowed the scope of the patent claims that with that construction in mind Colgate would never have made the concession of infringement. Because the motion rested entirely upon what the Court of Appeals had said and meant in its March 8, 1956 decision, the District Court suggested that motion for leave to proceed with the District Court motion should be made by Colgate in the Court of Appeals.

Colgate made such motion for leave on March 4, 1957. This motion was denied on April 1, 1957; and, it is on that decision of the Court of Appeals denying the motion that the present petition for certiorari is predicated.

The present petition does not seek review of the denial of relief from the stipulation, but instead requests invalidation of the patent.

I

False Premise of Colgate's Second Petition

Colgate's instant second petition is based upon the premise that the denial below of its motion for relief on April 1, 1957 "modifies, amends, or construes" the judgment of the Court of Appeals dated March 8, 1956 which this Court refused to review by denying Colgate's first petition.

This premise is **false.**

Colgate's motion for leave to obtain relief from its stipulation and new trial on the issue of infringement was based upon its mistaken notions of what the Court of Appeals said and meant in its opinion and judgment of March 8, 1956.

In its motion, Colgate asserted the Court of Appeals had narrowed the broad District Court interpretation of the patented invention to the specific formula of RISE* itself as expressed only in claim 21. Colgate said:

> "4. Colgate counterclaimed for a declaration that all 21 claims of the Spitzer patent were invalid for lack of invention. The trial court upheld the validity of all 21 claims of the patent *as written* and found that the eight claims designated by the plaintiffs as infringed by one or more of the three Colgate products were so infringed.
>
> "45. * * * Certainly no one had reason to believe that the claims would be substantially narrowed in scope by a *redefinition* of the invention occurring in the first instance in the Court of Appeals." (Para-

* RISE is the commercial embodiment of the invention marketed by respondents.

graphs 4 and 45, Affidavit of John T. Cahill in support of Motion of Dfdt. Colgate-Palmolive Co. to Modify Decree, Supplemental Record On Appeal page 44.) (Emphasis supplied.)

Colgate's counsel summarized the matter as follows:

> "In other words, under Judge Coleman's opinion and decision, we did not have the problem. It arose only out of the Court of Appeals' decision." (Page 150, Transcript of proceedings before the [District] Court on January 3, 1957.)

But Colgate's argument was preposterous since the Court of Appeals decision itself had quoted with approval the District Court interpretation of the patent claims (2nd Pet. App. 3b-4b). In its *per curiam* decision in 1957, the Court of Appeals rejected Colgate's argument and stated what is obvious from the 1956 opinion itself:

> "On the contrary, this court placed upon the patent the same interpretation as was placed upon it by the District Court." (2nd Pet. App. 2c)

The *per curiam* opinion of the Court of Appeals denying Colgate's motion did not amend, modify or construe its former judgment. The rationale of the Court's denial of the motion for relief from the stipulation of infringement is stated clearly as follows:

> "There is no allegation that the stipulation was entered into as the result of fraud or mistake. It was made by able and experienced patent lawyers who thoroughly understood what they were doing and who knew that the claims in question, if valid, were infringed by the products which had been placed on the

> market by their client. Having chosen to narrow their fight to the issue of validity and having lost on that issue, they must abide by the result. After validity and infringement have been decided against them in the District Court and the decree of that court has been affirmed by this court with denial of certiorari by the Supreme Court, it is too late to start all over again and deny liability on a ground that has been abandoned in the course of the trial." (2nd Pet. App. 2c.)

The foregoing was the ground for denial of Colgate's motion for relief from the stipulation. The court need not have written any more. But, to disabuse Colgate of its mistaken notions the Court of Appeals stated there was "no basis" for Colgate's misinterpretations of the opinion of March 8, 1956, that the opinion "nowhere intimated" and "does not sustain" Colgate's misinterpretations thereof, and that its original opinion was "perfectly clear" (2nd Pet. App. 2c).

Not a word or syllable of the 1956 judgment has been changed in form or substance. All the Court of Appeals did in April 1957 was simply to set at rest Colgate's persistent attempts to misinterpret the opinion of 1956.

Then, as now, all 21 claims of the patent were judicially determined valid; and then as now, Colgate, the confessed infringer, is required to account for damages caused by its infringement and to obey the injunctions. Nothing has occurred since 1956 which injects a new controversy or new question into the litigation.

Colgate's new petition strives mightily to develop an ambiguity in the first opinion of the Court of Appeals. None such exists, as the Court of Appeals itself has said. Colgate's say-so that there is an ambiguity can not change the fact there is no ambiguity.

As will be hereinafter pointed out, the present petition presents no legal questions for review not previously presented in Colgate's 1956 petition. This in itself confirms the fact there is no ambiguity.

Colgate's pretext that it still misunderstands the meaning of the Court of Appeals' 1956 decision, which finally and plainly settled the controversy, should not occasion review by this Court. The same principle which caused this Court to refuse review in *Department of Banking* v. *Pink*, 317 U. S. 264 (1942) and *Federal Trade Commission* v. *Minneapolis-Honeywell*, 344 U. S. 206 (1952) applies even more forcefully in the present case where review already has been twice denied.

At some point litigation must end, and that point will never be in sight if a party can prolong the certiorari period indefinitely by applying successively for review of an entire case through the device of procuring denials of motions in the appellate courts concerning administrative matters which do not affect the merits of the cause and do not affect the decision as to which review already has been denied.*

II

The Court of Appeals did not in fact limit the scope of the patent claims in either the 1956 or the 1957 decision.

The Court of Appeals has insisted that it neither did nor decided anything inconsistent with or to disturb the broad scope of the invention as sustained by Judge Coleman in the District Court. In this regard the Court of Appeals

* The District Court termed Colgate's defense to the patent "specious"; the Court of Appeals found the litigation "unnecessary and vexatious" (2nd Pet. App. 18b)

was undoubtedly correct as can be seen from examination of the opinions of the two courts (App. B and D, Colgate's second petition).

Colgate's misinterpretation that the 1956 judgment of the Court of Appeals instead narrowed the validity of the patent to the RISE formula and to claim 21 is based upon carefully culled excerpts from that opinion wherein the Court of Appeals referred to history of the invention, Colgate's unsuccessful attempt to imitate RISE, the Segelken patents and prior use, and the novelty and utility of the invention as a shaving lather (2nd Pet. 8-12).

As we pointed out in our brief in opposition to the first petition, page 9, rather than narrowing the invention to claim 21, the Court of Appeals' opinion quoted five claims as typical (not claim 21) (2nd Pet. App. 5b-7b), quoted from the broad description of the invention in the patent specification (2nd Pet. App. 5b), and quoted with approval the broad interpretation of the entire 21 claims of the patent laid down in the trial court opinion (2nd Pet. App. 4b).

Colgate's discussion of the disposal of the Segelken foreign patents and prior use is of the same misleading sort. The Court of Appeals was fully aware of the breadth of the claims in suit but pointed out that these Segelken disclosures did not teach how to make *any* combination of self-generating lather. The Court properly held there was no disclosure *at all* of "what mixture of propellants is to be used with what mixture of soaps" (2nd Pet. App. 9b). Moreover, the Segelken prior *use* defense was thrown out for failure of proof "necessary to invalidate a patent by *oral* evidence of prior use." (2nd Pet. App. 9b), as had been done by the District Court (2nd Pet. App. 20d).

All of the remaining truncated quotations from the 1956 opinion relied upon by Colgate are mere shorthand

expressions which are entirely consistent with the Appellate Court's broad definition of the invention.

The Court of Appeals certainly knew what it meant and said in its 1956 opinion, and all of Colgate's misinterpretations were rejected in the *per curiam* opinion of that Court printed as Appendix C to Colgate's present petition. For a detailed refutation of Colgate's frivolous arguments see excerpts from "Plaintiffs' Memorandum In Opposition To Colgate's Motion for Leave, etc." printed as Appendix G hereto, and see also our District Court affidavit in opposition to the motion for relief.*

III

This Court has already refused to review validity of the patent on the same grounds as those presented in the new petition.

This second petition for certiorari does not request review of the denial by the Court of Appeals of Colgate's motion to be relieved of the stipulation conceding infringement. Instead, it uses this denial of the Court of Appeals as a subterfuge in a further effort to have this Court review the merits of the patent itself. The only relief it seeks on the present petition is to have this Court invalidate the patent.

Colgate's assertions that the instant petition for certiorari presents "an opportunity to pass upon significant patent issues which have long awaited this Court's review" (2nd Pet. 26), and contains grounds "substantially different" from the first petition (2nd Pet. 14) must be considered frivolous.

*Affidavit in Opposition To Motion of Defendant Colgate-Palmolive Company For Modification of Decree, Supplemental Record on Appeal pages 73-98.

Colgate's arguments and "Reasons for Allowance of the Writ" are substantially identical with those presented on its first petition for certiorari. Colgate now argues over again the same alleged errors of the 1956 judgment that it alleged therein in 1956.

Alleged Redefinition of the Invention by the Court of Appeals (2nd Pet., pp. 6-13)

Colgate's arguments of alleged ambiguity in the appellate judgment were expressed similarly at pages 13-22 of the first petition, pages 8-10 of Colgate's reply brief and pages 7-8 of Colgate's petition for rehearing. Our brief in opposition, page 9, set forth the very same facts cited later by the Court of Appeals for rejecting Colgate's mistaken notions.

Allegedly "Erroneous" Principles of Law in the Court of Appeals' Decision of 1956, the *United Carbon* case. (2nd Pet., pp. 16-17)

This same "double standard" argument was made at pages 16-22 of the first petition by reference to another case upholding the same general proposition:*

> "Despite its belief that the invention of the patent is a most specific combination, the Court of Appeals sustained all 21 claims of the Spitzer patent which monopolize the pressure packaging of soap." (1st Pet., p. 22)

See also pages 11-12 of Colgate's reply brief in support of its first petition for certiorari. At pages 9-10 of our brief in opposition to the first petition we showed that

*Altoona Publix v. American Tri-Ergon, 294 U. S. 477 (1935).

rather than upholding invention in ignorance of the broad coverage of the claims, the Court of Appeals quoted in the opinion extremely broad language from the patent specification and quoted five broad claims of the patent "as typical."

Alleged Failure to Measure the Invention Against the Claims, the *Funk* Case (2nd Pet., p. 17)

Colgate presented the substantially similar argument at pages 22-5 of its first petition and cited the similar cases of *Mandel Bros.* v. *Wallace*, 335 U. S. 291, 295 and *Sinclair* v. *Interchemical*, 325 U. S. 327 (1945). The argument that the patentees had "monopolized the *idea* of pressure packaging *soap*" ran *throughout* Colgate's Petition for Rehearing on its first petition and was the basis thereof. Pages 10-11 of our brief in opposition showed, as both courts below held, that the invention was not in pressure packaging soap but in a new composition of matter generating a new kind of lather unknown to prior shaving lathers and with new and unexpected properties.

Alleged Failure to Strike Claims Alleged to be Impractical Without Improvement by Others (2nd Pet. p. 19)

This argument rests solely upon a suggestion made by one of the patentees before the application for the patent in suit was filed (PX 37, p. 25), that a claim be included covering Freons 11, 21 and 22 and Genetron 101 and 102 J, and upon a remark in the trial below (Tr. 167) that Freon 11 could not be used as a propellant in the shaving lather contemplated for marketing by the patentees.

The issued claims of the patent in suit do not cover the group of propellants of the pre-application suggestion. The patentees rejected Freon 11 for their own most preferred

commercial embodiment of the invention, but this does not mean that Freon 11 was impractical or "entirely unusable" (2nd Pet. bottom p. 5).

The same assertion on the basis of the same trial exhibit and testimony was made at bottom of page 19, top of page 20, and appendix pages 7a and 8a of Colgate's first petition for certiorari.

Alleged Unlikelihood of Further Litigation (2nd Pet., p. 22)

Colgate's present argument was made at page 8 of its first petition, page 3 of its reply brief in support of the 1st petition and pages 4-5 of the petition for rehearing.

Pages 7-8 of our brief in opposition showed there are numerous companies outside the 4th Circuit who could easily litigate the patent in suit if they so desired. This is still true today.

Respondents to this day have not initiated or threatened further litigation within the Fourth Circuit, and have taken no steps to initiate or to avoid litigation outside the Fourth Circuit.

The Second Circuit *Mennen* case was adjourned at the request of Mennen. Mennen is plaintiff and is in control of that litigation. Mennen has been offered a license by respondents, but has chosen to refuse. The case presumably will be prosecuted to finality.

The possibility that respondents could obtain a preliminary injunction in future litigation already existed in 1956 and was not created by the 1957 decision. This point too was raised previously—see page 3 of Colgate's reply brief in support of its first petition.

Alleged Concession of Anticipation by Segelken (2nd Pet., pp. 11-12, 17)

This erroneous and misleading argument was made at page 15 of the first petition, and pages 10-11 of Colgate's reply brief.

See pages 18-19 of our brief in opposition to the first petition.

Alleged "Oppressive" Licensing (2nd Pet., p. 22)

A less vitriolic version of this same argument was made at pages 6-8 of Colgate's first petition for certiorari, and *in extenso* at pages 2-4 of its reply brief in support of the first petition.

As our brief in opposition stated, pages 6-7, respondents have offered licenses to any member of the trade who wants them. Except for Colgate, now masking as champion of the public interest, the vast majority of the trade—from the small door-to-door vendors like W. T. Rawleigh Co. to the giants such as American Home Products and Procter & Gamble—recognizing the basic advance and worth of the patent, have voluntarily taken licenses. Some of these took licenses before the decisions below, and some after. No one has been pressed to take a license.

What has been added in the second petition for certiorari is a word—"Oppressive"—and a so-called standard license (Appendix A to 2nd Pet.) which was not in any way influenced as to its terms by the decision of April, 1957. Indeed, it could not be since, as Appendix A shows on its face, it was drafted in 1956. This is not to say, however, there is anything at all oppressive or repugnant in its terms. The license's acknowledgment of validity is an express statement of what the law implies in any event. *Automatic Radio* v. *Hazeltine Research*, 339 U. S. 827, 836

(1950). Further, there is nothing unusual about requiring payment of royalties for the full life of the patent where, in addition to a license under the issued patent, the license extends to improvements and modifications. Also, it is not true that the licensee is compelled to pay royalties on a product not covered by the Spitzer claims. Appendix A clearly states that the license is granted under the Spitzer patent and the royalties are to be paid for the term of the patent. The licensed product is thus tied in with the patent coverage and with the life of the patent.

Conclusion

Colgate has burdened this Court with a rehash of its twice rejected first petition for certiorari.

Again Colgate rests its thrust on "threats" to the "soap industry" by assertions *de hors* the record.

As the opinions below show, the invention of the patent in suit created and fostered competition in a field dominated by major companies. Respondent Carter, a stranger to that field, was enabled by the invention to enter and compete successfully with companies more than ten times its size, notably Colgate, Squibb, American Home Products, Rexall, Proctor & Gamble, Sterling Drug, etc.*

Excepting Colgate, who stated to its customers that its admittedly infringing products were "the greatest discovery in shaving history since the invention of the safety razor" (2nd Pet. App. 23d), the major proportion of the

*Although Colgate now belittles the invention, the concurrent findings below are that the invention "was copied by an infringer [Colgate] who was one of the largest soap manufacturers of the country and who had been trying in vain to develop a similar product but had been unable to do so until the knowledge of one of the patentees was obtained." (2nd Pet. App. 12b)

trade is manufacturing and selling the invention under licenses.

Here truly is a patent which serves the constitutional purpose of promoting the progress of science and the useful arts, creating and fostering competition with all the benefits that derive from such competition.

For the reasons above and the reasons set forth in our brief in opposition to the first petition, Colgate's instant second petition for certiorari should be denied.

Respectfully submitted,

GEORGE B. FINNEGAN, JR.
Attorney for Respondents
30 Broad Street
New York 4, New York

Of Counsel:

WILLIAM D. DENSON
(of Washington, D. C.)

MORRIS KIRSCHSTEIN
JEROME G. LEE
(of New York, New York)

July 22, 1957

APPENDIX

G

Excerpts From Plaintiffs' Memorandum Filed in the United States Court of Appeals for the Fourth Circuit, in Opposition to Colgate's Motion for Leave to Continue with the Presentation of a Motion to the District Court

II

Colgate's motion for new trial is without substance; this Court did not narrow the scope of the patent.

(a) This Court Defined the Invention Broadly; All 21 Claims Were Expressly Sustained

Chief Judge Parker wrote the opinion of this Court. It is an exhaustive treatment of the scope and validity of the patent. It shows that far from narrowing the invention defined by the District Court and the patent claims, the Court of Appeals adopted the District Court's definition as its own and affirmed all claims of the patent without any limitation whatsoever.

At the outset of the opinion under the heading "The Validity of the Patent", Judge Parker defined what the patentees invented as:

> "a mixture * * * enclosed in a small container (that), upon the opening of a valve, would emerge in the form of a durable lather, which, without whipping up or other agitation, could be used for shaving purposes * * * after several months of work and experimentation they developed an emulsion consisting of

an aqueous soap solution mixed with certain gases liquefied by pressure, which they enclosed in a container. When the valve of the container was opened the pressure of the gases extruded the emulsion and, as it came from the can, the particles of gas expanded into minute bubbles covered with soap which was the shaving lather desired." (230 F. 2d 857).

Judge Parker twice repeated his definition of the invention in similar broad terms:

"What was novel was to get a mixture of the right gases, with the right soaps in the right pressure, so that a lather satisfactory for shaving purposes would be produced when the mixture was allowed to emerge." (idem, p. 858).

"What we have is not the mere use of propellant gases to extrude shaving soap from a container. But the use of particular propellant gases liquefied under pressure and combined in such way with particular aqueous soap solutions as to produce an emulsion, which, when released from the container, becomes a lather composed of tiny gas bubbles coated with soap and useful for shaving." (idem, p. 861).

These broad definitions of the scope of the invention are entirely consistent with the District Court definition, as well as with those of the patent specification and claims. Indeed, at pages 859 and 860 of the opinion, this Court adopted verbatim a large portion of Judge Coleman's opinion which "summarized the matter." This portion includes the following:

"But the combination of an aqueous soap solution, emulsified in the liquid base with a Freon which had

not only low water solubility but which combined the properties of (1) not smarting or burning the face, and (2) good, stable lather, was unknown."

• • •

"It is this combination of a relatively small group of Freons, that manifest those desirable properties of low water solubility and the optimum characteristics of non-smarting and of lather quality, with aqueous soap solutions that constitutes the invention of Spitzer and his associates. They discovered that all three of these characteristics were inter-related. They found that Freons having a solubility in water not exceeding about 32 cc. of gas to 100 grams of water to be the type of Freons productive of the optimum of the other two qualities desired in the lather composition. That is what the specifications of the Spitzer patent teach, and all 8 of the claims in suit are responsive to this teaching."

• • •

"In fact, the entire 21 claims of the patent are so limited." (idem, pp. 858-859).

Still following and adopting Judge Coleman's definition of the invention, this Court then stated the "invention is *thus* described" in the patent specification itself. This Court then proceeded to adopt verbatim portions of the patent specification previously quoted in the District Court opinion.

In view of the foregoing excerpts from the opinion of Judge Coleman and from the patent, quoted and adopted with approval in this Court's opinion, it is preposterous for Colgate to contend that a narrower definition of the invention was intended or made by this Court.

Furthermore, in the very next portion of the opinion this Court quotes in full claims 2, 6, 10, 16 and 20 of the patent. The opinion characterizes these claims as "typical" of the "claims in suit" (pp. 859-860). Claims 2 and 16 are *not* among the 8 narrower claims as to which infringement was conceded by Colgate (Colgate appendix B, p. 4), so it is obvious that the Court referred to these five claims as "typical" of the entire 21 claims of the patent—all of which were in suit as to validity. The Court clearly considered these five broad and narrow claims were "typical" of the wide scope of the invention defined in the District Court opinion and the patent specification.

These five "typical" claims run the gamut of breadth, and all come within the invention as defined in the immediately preceding pages of this Court's opinion quoted above. Claim 2 is the broadest of those quoted and serves to demonstrate the line-by-line conformity between this Court's definition of the invention and the claims selected as typical. Claim 2 has:

From Opinion	*From Claim 2*
"the right gases"	"said propellant being a halogenated alkane having not more than two carbon atoms and containing at least one fluorine atom * * * having a solubility in water not exceeding 32 cc. of gas to 100 grams of water at atmospheric pressure and 25 degrees C."
"the right soaps"	"said soap solution comprising a solution which is non-gelling at room temperatures * * * a substantial proportion of the soap in said soap solution comprising at least one soap selected from the group consisting of the soaps of potassium, sodium and the water soluble aliphatic amines."
"in the right proportions"	"a solution * * * which contains at least about 5% and not substantially exceeding about 30% by weight of soap * * * the proportion of propellant being from about 0.2 to about 0.0125 mole per 100 grams of the composition."
"under the right pressure"	"said propellant having a vapor pressure in the range from about 5 to 300 pound per square inch."
"so that a lather satisfactory for shaving would be produced"	"a composition for use in producing a stable lather."

The fact that this Court expressly quoted broad claim 2 and others as defining the invention renders absurd Colgate's contention that this Court reduced the invention to the ambit of a single narrow claim, claim 21.

The further fact that this Court's definition of the invention, tabulated above, specifies soaps, gases and proportions (ranges) all appearing in claim 2, which was quoted by Judge Parker as "typical", is utterly destructive of Colgate's proposition that this Court confined the patent to the specific formulation of RISE only.

Finally, this Court devoted an entire section (pp. 865-866) of its opinion to the propriety of the District Court decree. It very carefully reviewed the impact of its views on the specific provisions of the decree. The only point on which this Court differed with the District Court related, not to the patent or to its claims, but to the secret specified in paragraph 12 (b) of the decree. However, this Court stated that nevertheless no change in the decree was necessary (p. 865). Certainly, if this Court had differed with the District Court as to the scope or definition of the invention, it would have so stated. It did not. This Court noted no limitation or modification whatsoever.

Colgate's moving papers and briefs on both its motions here involved ignore the overwhelming body of this Court's opinion. Instead Colgate pins its case on carefully selected fragments of the opinion which, when taken in context, wholly fail to support its position.

(b) The Remarks Concerning Colgate's "Failures" by This Court and in Plaintiffs' Brief Are Entirely Consistent with the Broad Definition of the Invention in the Opinion.

The quotations of the Court relied upon by Colgate are mere shorthand summaries of the evidence showing that before Colgate used its RISE soap analysis and was

told the identity of the RISE propellant by Kinetic of Du Pont (D. A. 680), its chemists were unable to produce *any* pressurized lather *useful* for shaving. In fact, Colgate's chemists did not approach even the broadest aspects of the invention because all their work at that time foundered upon the use of highly irritating, water-soluble gas (Genetron 101)* and upon proportions of soap outside all 21 claims.** These fundamental facts were accurately reflected in this Court's statement:

> "But the use of *particular propellant gases* liquified under pressure and combined in such way with *particular aqueous soap solutions* as to produce an emulsion, which, when released from the container, becames a lather composed of tiny gas bubbles coated with soap and *useful for shaving*—a product which was new and useful, which the expert chemists of Colgate had tried unsuccessfully to produce, and which achieved at once unqualified commercial success." (230 F. 2d 861).

The second quotation of this Court relied upon by Colgate is another shorthand expression of the evidence showing that even after analyzing plaintiffs' commercial embodiment of the invention—RISE—Colgate still tried with its corps of chemists to imitate RISE but were unable to prepare a copy good enough to compete there with:

---

*All of the 21 claims require that the propellant gases have a solubility in water of less than 32 cc. per 100 grams, which solubility Genetron 101 substantially exceeds. (P. Ex. 44, P. A. 472; D. Col. Ex. 103, D. A. 836; P. Ex. 67, pp. 77, 80, 101, 114).

**Colgate's work prior to analyzing RISE was confined to soap solutions exceeding 30% by weight. The broadest claims specify that the soap solution contain "at least about 5% and not substantially exceeding about 30% by weight of soap." (P. Ex. 67, pp. 88, 97, 98).

> "*after* it had been produced and Colgate had purchased it on the market and had it analyzed, Colgate's corps of expert chemists were *still* not able to produce it until the knowledge of one of the patentees was availed of." (230 F. 2d 861).

These statements of the Court are a far cry from anything narrowing the scope of the invention. They consisted simply in regarding Colgate's failures *as one fact* showing non-obviousness in the total invention—whose broad aspects Colgate could not arrive at *before* analyzing RISE and the commercial aspects of which Colgate could not arrive at *after* analyzing RISE. In so doing this Court was following established law.